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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ANTONIO B., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO B.,

Defendant and Appellant.

B216961

(Los Angeles County  
Super. Ct. No. FJ41809)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Shep Zebberman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant  
and Appellant.

No appearance for Plaintiff and Respondent.

Antonio B. appeals from an order of the superior court denying his motion for the return of property. Appellant previously was declared a ward of the court (Welf. & Inst. Code, § 602) and was placed on probation in the home of his parents following his admission that he possessed marijuana for sale (Health & Saf. Code, § 11359). In a prior appeal, we held that appellant's motion to suppress evidence should have been granted because there was no probable cause to arrest him and his consent to the search was not voluntary. (*In re Antonio B.* (2008) 166 Cal.App.4th 435, 438 (*Antonio B.*)). On January 29, 2009, the juvenile court granted appellant's motion to dismiss the petition. Appellant then filed a motion, pursuant to Penal Code sections 1538.5 and 1540, for the return of \$447 that was confiscated when he was arrested. Following a hearing, the juvenile court denied the motion, based on a finding that the money was obtained through the sale of illegal drugs.

Appellant argued in his motion that the money was not subject to forfeiture pursuant to Health and Safety Code section 11470, subdivision (f), because a forfeiture pursuant to that section requires a conviction, and appellant did not suffer a conviction. (Health & Saf. Code, § 11488.4, subd. (i)(3).) At the hearing, the court stated that this was not an asset forfeiture case but a statutory motion for return of property. (Pen. Code, §§ 1538.5, 1540.) The court reasoned that property should be returned unless it is otherwise subject to lawful detention and that a defendant is not entitled to the return of stolen property or contraband, a term the court defined to include proceeds of drug sales. (See Pen. Code, §§ 1417.5, 1417.6.)

Detective Hugo Cepeida testified at the hearing that he found cocaine, marijuana, and \$447 in cash when he searched appellant and that appellant told him that "he was selling drugs for his hommies [*sic*]." The court found that the \$447 was drug proceeds and stated that it was not consistent with "rehabilitative philosophy or any philosophy of the juvenile court to return money that is obtained by a minor through the sale of illegal drugs." The court further stated its belief that the statutes dealing with asset forfeiture and return of exhibits were not relevant and that appellant had no claim to the money

because it was obtained illegally. Appellant filed a notice of appeal.

After review of the record, appellant's court-appointed counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441.

On March 19, 2010, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. No response has been received to date.

On May 26, 2010, we requested letter briefs addressing whether the trial court erred in denying appellant's motion for return of property. On June 3, 2010, respondent filed a letter brief acknowledging that the trial court erred.

Pursuant to Penal Code section 1538.5, "[a] criminal defendant may move for return of property before trial on the ground the seizure was unreasonable." (*People v. Lamonte* (1997) 53 Cal.App.4th 544, 549 (*Lamonte*)). "Persons may not be deprived of property without due process of law, nor may the Legislature expropriate private property by mere legislative enactment. [Citations.] 'The right to regain possession of one's property is a substantial right which may not be dependent upon the whim and caprice of a court . . . .' [Citation.]" (*Ibid.*) Unless the property is contraband or otherwise subject to forfeiture, "[c]ontinued official retention of legal property with no further criminal action pending violates the owner's due process rights. [Citation.]" (*Ibid.*; see Pen. Code, § 1417.6.)

In addition to the pretrial procedure of Penal Code section 1538.5, Penal Code section 1417.5 states that, "[e]xcept as provided in Section 1417.6, 60 days after the final determination of a criminal action or proceeding, the clerk of the court shall dispose of all exhibits introduced or filed in the case and remaining in the clerk's possession, . . . ." Penal Code section 1417.6, subdivision (a) excludes from return to the defendant "any dangerous or deadly weapons, narcotic or poisonous drugs, explosives, or any property of any kind or character whatsoever the possession of which is prohibited by law and that

was used by a defendant in the commission of the crime of which the defendant was convicted, . . .”

Thus, “only legal property may be returned to the person from whom it was taken. ‘[T]he People have the right to detain any property which it is unlawful to possess, and such right exists whether the property was lawfully seized or not.’ [Citation.]” (*Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547.) In addition, “[c]ertain dangerous weapons and property, tools and devices used in motor vehicle chop shops and property illegal to possess and used by a defendant to commit the crime are excepted from return to the owner.” (*Lamonte, supra*, 53 Cal.App.4th at pp. 550-551, fn. omitted.)

In *Lamonte*, the defendant sought the return of property following his guilty plea to being a felon in possession of a firearm and second degree burglary. The trial court refused to order the return of computer equipment that was not stolen but that may have been used to gather information illegally. On appeal, the court rejected the People’s argument that property used to commit a crime is or becomes contraband and should not be returned. (*Lamonte, supra*, 53 Cal.App.4th at p. 552.) The court reasoned that “[c]ontraband is goods or merchandise whose importation, exportation, or possession is forbidden. [Citation.] Property used to commit a crime is not necessarily contraband.” (*Ibid.*) The court directed the superior court to order the return of the property. (*Id.* at p. 553.)

Similarly here, the property appellant sought to have returned was not stolen or illegal to possess. The money does not fall into any of the categories listed in Penal Code section 1417.6. There was no evidence that the money was used to commit a crime, and, even if there were such evidence, the possession of money is not “prohibited by law,” as required by the statute. (See Pen. Code, § 1417.6, subd. (a) [excluding from return to the defendant property “the possession of which is prohibited by law and that was used . . . in the commission of the crime . . . ].)

“An order denying a motion for return of property—whether or not the property has been admitted as evidence in a criminal trial—is not among the matters for which an

appeal is permitted under Penal Code section 1237. That section authorizes appeals from ‘any order made after judgment, affecting the substantial rights of the parties.’” (*People v. Hopkins* (2009) 171 Cal.App.4th 305, 308.) Thus, courts have held that “[a] motion for return of property is a separate procedure from the criminal trial and is not reviewable on an appeal from an ultimate judgment of conviction,” and that “[t]he proper avenue of redress” is a petition for writ of mandate, not an appeal. (*Ibid.*)

But “[a]n appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate . . . .” (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366.) This discretion “should be exercised only in unusual circumstances” that are “““compelling enough to indicate the propriety of a petition for writ . . . in the first instance . . . .’ [Citation.]”” [Citation.]” (*Id.* at pp. 1366-1367.) Here, to dismiss the appeal rather than exercising our power to reach the merits “would be “““unnecessarily dilatory and circuitous.”” [Citation.]’ [Citation.]” (*Id.* at p. 1367.)

### **DISPOSITION**

The judgment is reversed and the juvenile court is directed to enter an order granting the return of the property.<sup>1</sup>

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.

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<sup>1</sup> Appellant’s petition for writ of mandate in No. B223502, filed April 6, 2010, will be disposed of by separate order. Appellant’s motion to consolidate the cases, filed June 2, 2010, is hereby denied.